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MAXIMS

BEING

PART I OF THE MAXIMS OF EQUITY

BY

ROSCOE POUND

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HARVARD
LAW REVIEW

VOL. XXXIV JUNE, 1921 NO. 8

THE MAXIMS OF EQUITY — I

OF MAXIMS GENERALLY

1. PROVERBS AND MAXIMS [1]

MAXIMS in modern law are either inherited or borrowed from the Roman law or framed in the formative period of modern law "*juxta exemplum Romanorum.*" But the maxims of Roman law had their model, in large part at least, in the proverbs and maxims which are to be found among all peoples in a certain stage of culture. A distinction is made between popular proverbial sayings and literary proverbs or gnomes. According to the accepted theory the former were originally uttered spontaneously; they were spontaneous utterances called forth by unusual and stirring incidents and experiences. They were not made deliberately but sprang up out of the soil of national character. This orthodox doctrine as to proverbs savors of the romantic explanation of all social phenomena which came into vogue in the fore part of the last century, of which Savigny's theory of law as a spontaneous product of the *Volksgeist* is another example. In the light of recent philosophy and folk-psychology we may suspect that proverbial sayings are rather traditional versions of the orally expressed reflections of individuals gifted with more than ordinary power of observation, homely wit, and a trenchant tongue. Aristotle suggested some-

[1] Reference may be made to TRENCH, PROVERBS AND THEIR LESSONS (1905); GERBER, DIE SPRACHE ALS KUNST (1885), II, 397–442; BOIS, LA POÉSIE GNOMIQUE (1886).

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thing of this sort, saying that proverbs were remnants which because of their brevity and accuracy had been preserved out of the ruins of ancient philosophy.[2] Moreover, many of the earliest proverbs were responses of oracles. Our chief concern with these proverbial sayings is that they sometimes have to do with matters of law and are one of the forms of expression of customary law. As will be seen presently, legal proverbs attained some importance in Germanic law. For the rest, popular proverbial sayings furnished the model for the literary proverb or gnome and so ultimately for the legal maxim. By all accounts the literary proverb is a product of conscious reflection. Originally it may but cast a popular saying into literary or perhaps poetical form.[3] Presently it may express the first stirrings of philosophical reflection upon life and conduct. The fusion of advice about practical life, rules of agriculture, moral precepts, and political advice to rulers which we find in Hesiod is the beginning of the reflection on life that was to lead to ethical and political philosophy. Down to Socrates we find nothing but isolated maxims.[4] But Greek moral and political philosophy had its roots in the maxims and gnomes of Theognis and Phocylides and the gnomic poetry attributed to the Seven Sages. Thus maxims "stand on the threshold of philosophy"[5] and "form the transition to philosophy proper."[6] When conscious reflection begins, they bridge the gap between customary moral rules and ethical principles. The later throwing of ideals, not reflections on customary conduct, into the form of ethical maxims is quite another matter. Such maxims may eliminate all the limitations and obstacles that are encountered in practice and put practically unattainable standards in order to fire the imagination or excite moral enthusiasm.[7] They are related to the maxims of the beginning of ethical philosophy only in that in form they follow the model of the proverb.

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[2] Quoted by Synesius, Bekker, ARISTOTELIS OPERA, V, 1474.

[3] "The sayings attributed to the mythical or semi-mythical Seven Sages are crystallizations of popular morality which cannot be treated as the beginnings of a science." WUNDT, ETHICS (transl. by Titchener and others), II, 3.

[4] *Ibid.*

[5] ZELLER, PRESOCRATIC PHILOSOPHY (transl. by Alleyne), 121.

[6] ERDMANN, HISTORY OF PHILOSOPHY (transl. by Hough), I, § 18.

[7] FOWLER AND WILSON, PRINCIPLES OF MORALS (1894), II, 293–294.

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2. Maxims in Roman Law[8]

Dirksen[9] and Sanio[10] pointed out long ago that the maxims of which Roman juristic writing is full belong to the older legal science of the Republic and not to the classical period. Some of them are referred to the *auctoritas* of named jurists of the older period.[11] Others are expressly attributed to the *ueteres*.[12] Moreover the way in which these maxims are treated by the later jurists shows that they came from an earlier time and had traditional authority. They are cited as generally recognized truths or are even applied and interpreted as actual rules of law much as if they were statutory provisions.[13] If, with Girard,[14] we recognize three phases of legal development in republican Rome, namely, the esoteric phase in which the interpretation and application of the enacted and of the customary law were a monopoly of the pontifices, the phase of secularization and popularization, and the phase of systematization, Cato the Younger, with whom the practice of framing maxims is held to begin,[15] belongs in the second stage. Thus we see that the jurisprudence of maxims comes in at the very threshold of Roman legal science.

In the older practice, the case in hand was decided by a simple method of distinctions and analogies.[16] Also the older juristic

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[8] Reference may be made to Jörs, Römische Rechtswissenschaft zur Zeit der Republik (1888), 282–313; Jhering, Geist des römischen Rechts, I, § 3, II, § 40; Rabel, Origine de la règle Impossibilium nulla obligatio (1907); Bruns-Lenel, Geschichte und Quellen des römischen Rechts (Holtzendorff, Enzyklopädie der Rechtswissenschaft, 7 ed., I, 1915), § 30. I have relied largely on Jörs and on the texts he has collected.

[9] "Ueber den Zusammenhang der einzelnen Organe des positiven Rechts der Römer mit der gleichzeitigen juristischen Doctrin," 3 Rheinisches Museum für Jurisprudenz, 85, 106–109 (1829).

[10] De antiquis regulis iuris (1833).

[11] *E. g.*, many are attributed by name to Q. Mucius Scaevola. See references in Jörs, Römische Rechtswissenschaft zur Zeit der Republik, 291, n. 2.

[12] Dirksen cites Gaius, III, § 180, as an example. The title of the Digest, De diuersis regulis iuris antiqui (50, 17), tells the same story.

[13] *E. g.*, compare the maxim attributed to Cassius — *non possit causam possessionis sibi ipsa mutare* (Dig. XLI, 6, 1, 2)— with the interpretation by Iulianus: *quod uolgo respondetur causam possessionis neminem sibi mutare posse, sic accipiendum est, ut possessio non solum ciuilis sed etiam naturalis intellegatur.* Dig. XLI, 5, 2, 1.

[14] Manuel élémentaire du droit romain, 6 ed., 43–46.

[15] Jörs, Römische Rechtswissenschaft zur zeit der Republik, 289 ff.

[16] Jhering, Geist des römischen Rechts, III, § 49.

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writing was no more than a heaping together of legal materials in collections of actions and of *responsa*. The *Tripertita* of Sex. Aelius Catus, a work of this type although it essayed to be something more, marks the end of this method. On the basis of these collections which handed down the results of juristic craftsmanship, jurists began to think of the substance of the law, as distinguished from laws and as distinguished from method of decision. Accordingly they sought to find common points of view in the mass of collected or traditional *responsa*, formulae of actions and forms for legal transactions and sought to express these points of view concisely in maxims. But, says Jörs, these maxims at first are not addressed to the judge but to the jurist.[17] The *responsa* remained expert opinions as to the application of the law to particular cases. They did not seek to impart general legal information. Yet in view of the bulk and the diversity of the recorded *responsa* and the conflict of juristic opinion, it became important for the individual jurisconsult to state precisely and in terse language the point of view which he sought to express in a rule of law. The analogy of a statutory provision was obvious and naturally enough was made use of. "As the *lex* declared what should be law for the future, so the jurists, through their maxims, established what was rightful and legal for the present, and, as in the case of *leges*, their phrases were as sharp and concise as possible, sometimes in imperative form, sometimes in proverbial form." [18] It is likely that the model of proverbial sayings was before the minds of the jurists quite as much as the model of the terse and oracular phrases of the old statutes.

Another factor in the development of legal maxims is to be found in the *disputationes fori*, or public disputations upon questions of law. The very name (*regula*) indicates a measure which the teacher gives to the pupil for the decision of legal controversies. Every teacher has had experience of the desire of students for a crisp phrase which they may put down in their notebooks. Evidently many of the maxims were first framed for the use of students.[19]

[17] RÖMISCHE RECHTSWISSENSCHAFT ZUR ZEIT DER REPUBLIK, 293.

[18] *Ibid.* Examples of the statutory form are: *a ueteris praeceptum est* (DIG. XLI, 2, 3, 19); *ciuilis constitutio est* (DIG. XLVII, 1, 1, pr.); *ueteres decreuerunt* (DIG. XXVIII, 5, 32, pr.). Of the proverbial form: *quod uolgo dicitur* (GAIUS, II, § 49); *solemus etiam dicere* (DIG. II, 14, 7, 5).

[19] JÖRS, 294. As to the tendency of teachers to frame maxims or aphorisms, compare the maxim-like sayings of Zeno. BEVEN, STOICS AND SCEPTICS 18, 33.

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It is noteworthy that in Roman law, as later in the common law, a great number of maxims have to do with principles of interpretation of statutes and of legal transactions. This is parallel development, not borrowing. But it is significant of the stage of development at which maxims arise. The strict law takes no account of will or intention as such. The words operate quite independent of the thought behind them.[20] At the end of a period of strict law, as lawyers begin to reflect and to teach something more than a tradition, as they begin to be influenced by philosophy to give over purely mechanical methods and to measure things by reason rather than by arbitrary will, a chief effect is to change the emphasis from form to substance, from the letter to the spirit and intent. When statutes and legal transactions were looked at in this way, maxims grew up announcing policies to be followed in interpretation in doubtful cases. Thus there were maxims to the effect that certain relations or certain situations were to be favored,[21] that words were to be interpreted in favor of promissors and against those from whom the transaction proceeds,[22] that the milder interpretation was to be preferred in certain cases,[23] and generally that as between different possible interpretations the more intrinsically meritorious was to be adopted.[24] The transition to the natural law of the classical jurists was easy. "From recognition that certain *regulae*, to be discovered and established by juristic research, lay at the foundation of application of law, it was a short

[20] JHERING, GEIST DES RÖMISCHEN RECHTS, III, § 49; DANZ, GESCHICHTE DES RÖMISCHEN RECHTS, I, § 142.

[21] *E. g.*, — "Where the will of the manumitter is doubtful, freedom is to be favored" (DIG. L, 17, 179). — *Cf.* DIG. L, 17, 20, to like effect. "In case of doubt it is better to decide in favor of dower" (DIG. L, 17, 85). *Cf.* DIG. XXIII, 3, 70, to the same effect. "In testaments we interpret the will of the testators liberally" (DIG. L, 17, 12).

[22] It should be remembered that in Roman law the promisee or creditor speaks, not the promisor or debtor, as in our law. These maxims appear in two forms, which suggest much as to the development of a jurisprudence of maxims into a jurisprudence of principles. In an older form we have special maxims as to particular transactions, *e. g.*, stipulations, DIG. XXXIV, 5, 26, XLV, 1, 99, pr., XLV, 1, 38, 18; sales, — "that is taken which is to the disadvantage of the seller" (DIG. XVII, 1, 33), "the agreement is to be interpreted against the seller" (DIG. L, 17, 172); letting and hiring, DIG. II, 14, 39. In a later form these are generalized. DIG. L, 17, 96.

[23] Here again the earlier form applies to penalties. "In penal causes the milder interpretation is to be made." DIG. L, 17, 155, 2. Later it is generalized. DIG. I, 3, 18, L, 17, 56, L, 17, 192, 1.

[24] DIG. I, 3, 19, XXXIV, 5, 24, L, 17, 67.

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step to the wider thought that a *lex* also need not be regarded as a mere aggregate of precepts but that these precepts themselves are but forms or derivatives of ideas of right which should be formulated theoretically as *regulae*." [25] This leads to the philosophical view of the *ratio iuris* [26] and of all legal rules, whether statutory or traditional or doctrinal, as but expressions of or attempts to formulate principles of natural law.

Application of maxims merely as solving phrases is a later abuse. The jurisprudence of maxims was a theoretical working over of the law for practical purposes. Roman legal science was never purely theoretical. Application to concrete causes was the end of theory and the end was kept constantly in view. But that end might be sought in two ways. One way was to begin with the cases which occurred in practice. The other way was to begin with the ideas which were taken to be behind the law and to treat the phenomena of practice as realizations of these ideas.[27] The older jurisprudence took the first course and the method of collecting *responsa* and *formulae* remained an important form of legal writing. Next came commentaries in which there is a transition from the method of beginning with cases to that of beginning with ideas, in that more and more the commentaries take account of general ideas of which the statutes are regarded as expressions and of spheres of interest and jural relations which the *formulae* are regarded as seeking to secure. The jurisprudence of maxims carries this still further and enters definitely on the method of beginning with ideas. It is "the first attempt at a theoretical formulation of law." [28]

Certain defects, characteristic of the period of legal history in which maxims arise, abide with the jurisprudence of maxims to the end. When the right line of evolution is followed, which leads through natural law to the maturity of law, the maxim develops into a fruitful legal principle and is merged therein.[29] But Roman

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[25] JÖRS, RÖMISCHE RECHTSWISSENSCHAFT ZUR ZEIT DER REPUBLIK, 295.

[26] DIG. I, 3, 15.

[27] JÖRS, RÖMISCHE RECHTSWISSENSCHAFT ZUR ZEIT DER REPUBLIK, 300.

[28] *Ibid.*

[29] Jörs gives the following example: When the burden of proof was first considered theoretically, a *regula* was framed to the effect that the plaintiff had the burden of proving his assertion. DIG. XXII, 3, 21. This continued to be used and the question as to proof of exceptions (equitable defenses) was met by another *regula* that "in an exception the defendant is a plaintiff." DIG. XLIV, 1, 1. But this did not suffice

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maxims develop in two other ways. Some become fixed in form from the beginning, retain their form throughout the subsequent history of the law, and become encrusted with exceptions and limitations or are turned into arbitrary special rules.[30] In such cases there is a survival of the methods and modes of thought of the strict law in situations where the maxim was too narrowly conceived at too early a stage of the jurisprudence of maxims and acquired an authoritative stamp before it was critically examined and restated. Others are diverted from their original function of standards for the decision of controversies or from the outset are theoretical and become vague high-sounding generalities, of no practical import, and may even serve to darken counsel and to retard the working out of a sound principle.[31] In these cases we have a phenomenon of the beginnings of legal philosophy in the period of natural law or of the decadence of legal philosophy at the end of that period — of the time when juristic philosophy was finding itself and had not learned to make a proper use of concrete legal materials or of the time when it had exhausted itself for the time being and was unfruitful. In short, we have a characteristic phenomenon respectively of the transition from the strict law to natural law and of the transition from natural law to the maturity of law.

Writers on jurisprudence commonly speak of law as an aggregate of rules. But a legal system of any degree of development is more complex than this formula would indicate. Rules, that is, definite detailed provisions for definite detailed states of fact, are the staple of the beginnings of law and continue to be employed in the maturity of law in situations where there is exceptional need for certainty to maintain the economic order.[32] In a later stage

to meet cases where the defendant contended that he had paid or where the exception was met by a replication. After further *regulae* for these cases (DIG. XXII, 3, 25, 2), the jurists came ultimately to the general proposition that "the burden of proof lies on one who asserts not on one who denies." DIG. XXII, 3, 2.

[30] *E. g.*, DIG. XLI, 3, 33, 1, XLV, 1, 91, 3, L, 16, 231.

[31] "One who remains silent certainly does not speak; but nevertheless it is true that he does not deny." DIG. L, 17, 142. "Ignorance of law will not help those seeking to acquire, but will not be prejudicial to those who are seeking their own." DIG. XXII, 6, 6. "No one is held to act wrongfully who makes use of his own right." DIG. L, 17, 55.

[32] As to rules, principles, conceptions, and standards, see my papers, "Juristic Science and Law," 31 HARV. L. REV. 1047, 1060–1062, and "Administrative Application of Legal Standards," 44 REP. AMERICAN BAR ASSN., 445, 454–458.

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legal principles become a second element. These are general premises for juristic reasoning, to which we turn to supply new rules, to interpret old ones, to meet new situations, to measure the scope and application of rules and standards and to reconcile them when they conflict. This element comes into law with the advent of legal writing and juristic theory and its presence as a controlling factor is a mark of a developed legal order. A third element may be called legal conceptions. These are more or less exactly defined types to which we refer or by which we classify cases so that when a particular case is so classified we may attribute to it the legal consequences attaching to the type. This element is a product of juristic study in the attempt to set the materials of the law in order. In Roman law, maxims appear when the jurisconsults begin to reflect on law, when Greek influence, and so philosophical influence, are just beginning, when teaching of law compels the jurisconsult to begin to organize his materials through generalization. Bridging the transition from the strict law to the philosophical jurisprudence of the classical natural law, maxims are an intermediate step between rules and principles. This explains why so many maxims fall down between the two and acquire neither the detailed precision of rules nor the tested universality of legal principles. It explains also why it is that when principles come to be understood and to be worked out thoroughly, so many maxims become on the one hand mere traditional rules to be interpreted like *leges*, or on the other hand empty oracular phrases.

3. Maxims in the Canon Law [33]

Primarily the canonists were academic teachers. They were influenced immediately by the Roman law, the great subject of study in the Italian universities after the twelfth century, and had before them the sententious texts of the Digest, handed down from the jurisprudence of maxims of the jurists of the Republic. Also they were under the immediate influence of scholastic philosophy and logic. The whole method of canonist and of civilian came to be shaped externally by the scholastic modes of disputation; and it is not without significance that in the formal academic disputa-

[33] Savigny, Geschichte des römischen Rechts im Mittelalter, III, 567–570; Schulte, Geschichte der Quellen und Literatur des canonischen Rechts, I, 196, 213, II, 84.

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tions of the time a crisp formula of general currency was of much service to the disputant, whether as a theme, as a premise, or as an argument. Indeed our common-law use of "maxim" in this connection comes from thirteenth-century logic.[34] Thus the natural demand upon teachers to sum up their reflections in trenchant formulae was reinforced. Moreover the stage of legal development in which jurists were constrained by authoritative texts of the *Decretum* or of the Digest, which might be interpreted and applied but not questioned, is analogous to that in which the jurists of republican Rome began to comment reflectively on the *ius ciuile;* and it gave rise to similar phenomena.

Down to the last decade of the twelfth century the *Decretum* of Gratian was the sole basis of instruction in the canon law. After that time all the collections of decretals became the subject of study. But the method remained the same. First the teacher simply read the text, giving students an opportunity to write it down in case they were unable to procure a copy. Next followed observations as to the correct reading (*corrigere* or *emendare literam*), and next in order an exposition of the text. In the lectures on the *Decretum* and later on the decretals the readings on particular sections were preceded by an introduction to their content (*summa*) in order to acquaint the hearers with the general features of the subject. The exposition of the text involved five points: (1) raising or noting actual or apparent contradictions of the particular text, (2) solution of the apparent contradictions between equally authoritative texts and of questions of law arising out of them, (3) putting of cases, real or hypothetical, involved in the text or suggested thereby, (4) framing of general rules or maxims for the purpose of solving doubts or reconciling apparent contradictions, and (5) citation of parallel passages from the authorities.[35] The

[34] It is first used in the sense of "a widely received general assertion or rule" by Albertus Magnus (1193–1280), POST. ANAL. lib. I, cap. 2, and PETRUS HISPANUS (1226–1277). The latter says: "A maxim is a proposition than which no other is prior or better known." SUMMULAE, v. The term was used in this sense following the Summulae by Thomas Blundeville (1594). In the Oxford Dictionary several examples are given of its use in the fifteenth and sixteenth centuries to mean an axiom in mathematics or dialectics. Thence through Bacon and Coke it came definitely into our legal usage in the seventeenth century. As to the authority of Petrus Hispanus, because of his afterwards becoming Pope, see PRANTL, GESCHICHTE DER LOGIK, II, 264.

[35] SCHULTE, GESCHICHTE DER QUELLEN UND LITERATUR DES CANONISCHEN RECHTS, I, 213.

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general rules or maxims, called *brocarda* or *brocardi* or *brocardica*, are to be found frequently in the glosses, and were regarded as an essential part of the lectures.[36] They seem to have grown out of reflection on and attempts to solve real or apparent contradictions in texts which could only be interpreted. The practical occasion of the Roman *regulae* was the need of deciding cases on the basis of *leges* and *responsa*. The practical occasion of the brocards of the canon law was the need of settling the interpretation and application of authoritative texts. But the former were required for and developed by men who primarily were practitioners, while the latter were needed primarily for academic purposes and were developed by men who primarily were teachers.

Pillius, a teacher at Bologna in the latter part of the twelfth century, is named by Baldus as the first to use the term *brocarda* in his book of disputations (*Libellus disputorius*) near the end of that century.[37] But the important collection for the canon law is that of Damasus, who taught at Bologna in the second decade of the thirteenth century. His compilation is entitled *Brocarda siue regulae canonicae* and contains one hundred and twenty-five maxims. According to Schulte, he was the first to compile the maxims which up to that time were to be found only in the MSS. of the *Decretum* as part of the gloss.[38] Some time after 1234 Bartholomaeus Brixiensis revised the *Brocarda* of Damasus in his *Brocardica iuris canonici*.[39] The development of maxims in the canon law ends with the title *De regulis iuris* at the end of the Sext (1298) in which eighty-eight maxims are authoritatively laid down.[40] Some of them are taken from the title of the Digest, *De diuersis regulis iuris antiqui* (50, 17).[41]

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[36] SAVIGNY, GESCHICHTE DES RÖMISCHEN RECHTS IM MITTELALTER, III, 567.

[37] BALDUS ON USUS FEUDORUM, tit. *de feudo marchiae* (I, 14); SAVIGNY, GESCHICHTE DES RÖMISCHEN RECHTS IM MITTELALTER, III, 569, note f.

[38] SCHULTE, I, 196.

[39] SCHULTE, II, 84.

[40] It should be noted that the Sext uses the Roman term *regula*. The French very generally keep the term *brocard*. BAUDRY-LACANTINERIE, PRÉCIS DE DROIT CIVIL, 12 ed., 103; FABREGUETTES, LA LOGIQUE JUDICIAIRE ET L'ART DE JUGER, 199 ff. The canon law retains the Roman term *regula*, following the Sext. The Germans also say *Rechtsregel*. In the common law we say "maxim," following the writers on logic who influenced our classical texts in the seventeenth century. The Italians also say *massima giuridica*. The older Scotch writers speak of "brockards." STAIR, INSTITUTIONS OF THE LAW OF SCOTLAND, I, 10, 34 (1681).

[41] *E. g.*, No. 6 is DIG. L, 17, 185; No. 33 is DIG. L, 17, 75; No. 44 is equivalent to

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But a great part are the work of the glossators, and it is significant how many of them have to do with interpretation [42] and procedure.[43] The influence of this authoritative collection of maxims has been only second in importance to that of the last title of the Digest. "When in any century," says Maitland, "from the thirteenth to the nineteenth an English lawyer indulges in a Latin maxim, he is generally, though of this he may be profoundly ignorant, quoting from the Sext."[44]

Both the good and the bad features of a jurisprudence of maxims may be found in the maxims of the canon law. Here, as in the Roman law, they help to lead the jurists from a body of hard and fast rules, authoritatively imposed, above question and subject only to interpretation, to a conception of principles of reason, discoverable by juristic theory and philosophy, of which particular positive rules were but declaratory. Not only are they forerunners of the fruitful philosophical method of the following centuries, more immediately they are in the right line of descent of the systematic treatment of law as a whole which begins with the Humanists.[45] They are among the solvents of the strict law, as they were in republican Rome. On the other hand, even more than the Roman maxims they tend to become empty abstractions. Partly this is due to a certain moral or theological flavor. Partly it is due to their academic origin. Largely it is due to the circumstances of the stage of legal development to which they were appropriate and in which they arose. Attempts at generalization in that stage are necessarily crude. When they are not cautiously narrow they are uncritically broad and abstract and may easily acquire authority before they have been subjected to a thorough test. Maitland does not hesitate to describe the whole title of the Sext as a bouquet of "showy proverbs." [46]

DIG. L, 17, 142; No. 48 is DIG. L, 17, 206; No. 55 is DIG. L, 17, 10. Schulte says they are "generally rules taken from the Roman law." I, 44.

As to the authorship of this title, see SCHULTE, I, 44; VIOLLET, HISTOIRE DU DROIT CIVIL FRANÇAIS, 3 ed., 76–77.

[42] *E. g.*, Nos. 15, 16, 17, 30, 34, 35, 37, 39, 40, 42, 43, 45, 49, 53, 57, 61, 74, 80, 81, 88.

[43] *E. g.*, Nos. 8, 11, 12, 20, 24, 26, 47, 63, 71.

[44] 1 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, 196.

[45] SAVIGNY, SYSTEM DES RÖMISCHEN RECHTS IM MITTELALTER, III, 570.

[46] 1 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, 196. *Cf.* Savigny's estimate, III, 570.

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4. Maxims in the Civil Law [47]

For a time maxims had a concurrent development in the canon law and in the civil law. The assumptions, methods, and surroundings of decretist and of legist were the same. Both were teachers. Both expounded and explained authoritative texts. Indeed down to the period of the commentators the canonist was the more practical of the two. In law, as in other fields, there was no criticism. It was an age of authority. Moreover, while the canon law was growing through new papal legislation, the civil law could not grow in form and could be developed only by interpretation. In academic theory the German (Holy Roman) emperors were the successors of Augustus and of Justinian, and hence the Corpus Iuris Ciuilis was binding statute law for the civilized world. Accordingly the glossators treated the legislation of Justinian much as French jurists of the nineteenth century treated the Code Napoléon.[48] "In these laws of another age they saw a law made for their epoch; in their eyes the praetor was a *podesta*, the Roman *eques* a knight of the Middle Ages, the feudal emperor another Justinian reigning despotically over the anarchical society of the twelfth century." [49] Their interpretation was purely textual; "they had too much respect for the text to disfigure it at all in order to satisfy the needs of practice." [50] Thinking of the Digest as a statute and so of every text as written at the same time, their chief concern was to reconcile or, as it seemed to them, to solve the insoluble antinomies which it presents to analytical and dogmatic study.[51] As in the canon law and for like reasons, the necessity of solutions which would reconcile conflicting authoritative texts dictated the more important features of teaching and writing.

[47] Savigny, Geschichte des römischen Rechts im Mittelalter, III, §§ 204, 209; Brinz, Pandekten, 3 ed., I, § 12; Matthaeus, In titulum de diuersis regulis iuris antiqui commentarius (1615); Pothier, Pandectae, Tit. *de diuersis regulis iuris antiqui*; Fabreguettes, La logique judiciaire et l'art de juger, 192–273; Phillimore, Principles and Maxims of Jurisprudence.

[48] Brissaud, Histoire générale du droit français, I, 210.

[49] *Ibid.*

[50] *Ibid.*

[51] On the glossators see Pertile, Storia del diritto Italiano, 2 ed., II², § 61; Del Vecchio, Di Irnerio e la sua scuola (1869); Besta, L'opera di Irnerio (1896); Landsberg, Die Glosse des Accursius (1883); Pescatore, Die Glossen des Accursius (1888).

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A contemporary account tells us how the teacher proceeded: "First, I shall give you summaries of each title before I come to the text. Second, I shall put cases of particular laws well and distinctly. . . . Third, I shall read the text for the purpose of correcting it. Fourth, I shall repeat the case in brief terms. Fifth, I shall solve contradictions, adding *generalia* (which are commonly called *brocardica*) and distinctions and subtle and useful questions with their solutions." [52] As in the canon law, the *brocardica* are constructed to solve contradictions. Hence both the framing of the maxim and the discussion with its final solution in the form of a maxim go by the name "*brocardizare.*" [53] As has been said,[54] Pillius was the first to use the term *brocardi.* But while his book seems to have gone by the name of *Brocarda,*[55] it is evident that it was entitled *Libellus disputorius* [56] and that it was a collection of disputations as to conflicts of the texts together with the solving formulae. The first compilation of maxims as such is the *Brocarda* of Azo (1150–1230). The purpose of this book seems to be to reconcile conflicts between the maxims. It consists of a number of short legal maxims, citing authorities from the texts under each. Often, but not always, the maxim is followed by another, likewise fortified by citations, which seems to contradict it. After some observations, Azo develops the maxims further and explains them and seeks to reconcile the conflict.[57] Soon after comes the *Brocarda* of Damasus, already referred to,[58] "a book on the canon law very like the *Brocarda* of Azo on the Roman law." [59] This, as has been seen, was revised after 1234 by Bartholomaeus Brixiensis. Finally there is the *Distinctiones siue brocarda* of Petrus de Bellapertica († 1308) containing one hundred and twenty-five maxims.[60] It should be noted that this is the same number as the *Bro-*

[52] Odofredus (Odefroy), quoted in SAVIGNY, GESCHICHTE DES RÖMISCHEN RECHTS IM MITTELALTER, III, 553, note a; BRISSAUD, MANUEL D'HISTOIRE DU DROIT FRANÇAIS, 208.

[53] AZO ON COD. IV, 30, 13; SAVIGNY, III, 569. "*Brocardica materia dicitur que est contrariarum opinionum racionibus inuoluta.*" VOCABULARIUS UTRIUSQUE IURIS, s. v. *brocardica.*

[54] *Ante,* note 37.

[55] SAVIGNY, IV, 331.

[56] SAVIGNY, IV, 329, note c, 330, note d.

[57] On the Brocarda of Azo, see SAVIGNY, IV, § 14.

[58] *Ante,* note 36.

[59] SAVIGNY, V, 163.

[60] SAVIGNY, VI, 33.

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carda of Damasus. The derivation of the word *brocardum* is in doubt.[61]

In the hands of the glossators the law admitted no possibility of independent reasoning as such. Moreover, although the texts were in theory absolute and final authority, the attempt to make Justinian's law as such the law of mediaeval Europe could but fail, and had the result of putting the gloss, which applied the text to the needs of practice, in the first place. Hence in the period of the commentators the citations are of opinions and treatises, still treated as authoritative because expositions of the authoritative text.[62] This gave authority to the maxims of the prior period much as those of the canon law got authority through the last title of the Sext, and as the maxims of the republican law at Rome got authority from being embodied in the writings of the *ueteres*. One result was an "uncritical use of *brocarda*," now for practical purposes on a higher level than the texts, "in that these maxims often were given a wholly unwarranted extension." [63] The main reliance of the commentators was on dialectic and a rigid, mechanical, logical form in which ingenious objections were raised and refuted and conclusions were tried, not by the texts, but by hypothetical cases in which the acumen and logical power of the jurist were given ample scope. In the fully developed formal scheme of juristic treatment of a subject according to the *mos Italicus*, one of the steps was "the framing of general rules or maxims by abstraction." [64]

[61] It has been supposed to be derived from Burchard or Burkhard of Worms (†1026), author of a well-known collection of *decreta*. There are references to him as Brocardus and to his book as Burgodus which give this derivation a certain plausibility. SAVIGNY, III, 569, note h. Zoepfl says: "Burkhard already about the year 1000 must have made a collection of legal rules which through alteration of his name came to be called *Brocardica*, with which word subsequently the conception of maxims in general came to be connected." DEUTSCHE RECHTSGESCHICHTE, 4 ed., I, 125, note 16. It has often been pointed out that Burchard's collection of decretals does not answer this description. SAVIGNY, III, 569. A derivation from the Greek *βρόχος* has been suggested. PERTILE, STORIA DEL DIRITTO ITALIANO, II², 38.

[62] On the method of the Commentators reference may be made to BRUGI, OSSERVAZIONI SUL PERIODO STORICO DEI POSTGLOSSATORI IN ITALIA; SAVIGNY, GESCHICHTE DES RÖMISCHEN RECHTS IM MITTELALTER, VI, 1–25, 267 ff.; STINTZING, GESCHICHTE DER DEUTSCHEN RECHTSWISSENSCHAFT, I, 83, 106–133; ENGELMANN, SCHULDLEHRE DER POSTGLOSSATOREN, 1–16; BRISSAUD, HISTOIRE GÉNÉRALE DU DROIT FRANÇAIS, I, 213 ff.; Calisse in CONTINENTAL HISTORY SERIES, General Survey, 142–147.

[63] SAVIGNY, VI, 90. Cinus (1270–1336) attacked this tendency.

[64] STINTZING, GESCHICHTE DER DEUTSCHEN RECHTSWISSENSCHAFT, I, 108. These

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The maxims of the civilians were shaped in this period and indeed some originated therein. But the life was already out of them. The purposes for which the method had been devised were achieved. For a season there was "a pernicious abuse of *brocarda*" which "on a superficial appearance and often a misunderstanding of the sources, were assumed to be generally valid." [65] The renewed and critical historical and systematic study of the texts which came in with the Humanists did not wholly put an end to this abuse since the *mos Italicus* long persisted for practical purposes after the *mos Gallicus* had captured the Universities.[66] But the effect of the new method was to recall men to the Roman *regulae* in their Roman form, and the supervening philosophical jurisprudence of the law-of-nature school, definitely superseding authority and logical manipulation of authority by reason and superseding a jurisprudence of rules by a jurisprudence of principles, and the historical jurisprudence of the nineteenth century, systematizing the whole law on a scientific basis of history and analysis, left the maxims no real function. To those who know the law they serve as convenient catch phrases to express certain ideas or describe certain doctrines. In modern law "they play the rôle of the needle with respect to the pole. They do nothing but point." [67] As in the case of the needle, there is much deviation and many things may serve to deflect.

It will be seen that the development and decay of a jurisprudence of maxims in the Roman law was closely paralleled in the method of *brocardica* in the modern Roman law. The latter had the advantage of starting with the final form of the refined product of the former, and the greater part of the current maxims of the civilian are Roman or at least are adapted from the Digest.[68] But the period of the glossators and of the commentators is one of strict law, and the idea of authoritatively imposed rules admitting only of interpretation brought about the same results and was shaken off in the same way in the legal development of modern Europe as in the legal development of ancient Rome. In each case a jurisprudence of maxims helps the law pass from rules to principles and

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"bore the uncommon and unexplainable name of *brocardica* and later were called *regulae, loci communes* and *axiomata*." *Ibid.*

[65] SAVIGNY, VI, 9–10. [66] STINTZING, I, 121 ff.

[67] FABREGUETTES, LOGIQUE JUDICIAIRE ET L'ART DE JUGER, 194.

[68] FABREGUETTES, 196.

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leaves a legacy of showy or oracular proverbs [69] for the convenience or for the befuddlement of the future.[70]

5. Maxims in Germanic Law.[71]

Putting rules of law in the form of verse or rhyme or proverb is as old as law.[72] Everywhere customary law truly so called [73] tends to be put in terse, striking phrase, in verse or in rhyme.[74] "While law is still popular, it condenses in proverbs like popular speech." [75] Poisnel, quoted by Esmein, says: "In an unwritten law adages have a value which nowadays we do not suspect. A custom is fluctuating; later it is fixed; it becomes conscious of itself; now it is caught up and summed up in brief and forceful formula in order to recall it continually. Codes of written law have not the secret of the imperious language which the genius of a people creates in order to command its memory. These juridical proverbs were so well made that they were not forgotten." [76] Such proverbs are a transition from ordinary popular proverbial sayings to legal maxims. They are proverbial sayings which have grown up with more or less immediate relation to a practical purpose. Sometimes they

[69] "They are as so many oracles of jurisprudence." D'Aguesseau, Œuvres, I, 279.

[70] *Cf.* the difficulties made for French law, in the face of express provisions of the code, by the maxim *contra non ualentem non currit praescriptio.* Baudry-Lacantinerie, Precis de droit civil, I, §§ 1482–1496.

[71] Esmein, Cours d'histoire du droit français, 13 ed., 813–814; Brissaud, Manuel d'histoire du droit français, 1392; Chaisemartin, Proverbes du droit germanique (1891); Amira, Grundriss des germanischen Rechts, 2 ed., 10; Siegel, Deutsche Rechtsgeschichte, 3 ed., p. 2.

[72] Brunner, Grundzüge der deutschen Rechtsgeschichte, 7 ed., § 5. See also Maine, Early History of Institutions, 14–15; Maine, Early Law and Custom, 9–10.

[73] *I. e.*, as distinguished from received written non-enacted law, which got the name of customary law in the books on jurisprudence because of the theories of the historical school. See, *e. g.*, Carter, Law: Its Origin, Growth and Function, chap. 5.

[74] "Verse is one of the expedients for lessening the burden which the memory has to bear when writing is unknown or very little used." Maine, Early Law and Custom, 9. See Muirhead, Historical Introduction to the Private Law of Rome, 3 ed., 95; Huebner, History of Germanic Private Law, transl. by Philbrick, 10.

[75] Esmein, Cours d'histoire du droit français, 13 ed., 813.

[76] Recherches sur les sociétés universelles chez les romains, Nouvelle Revue historique du droit, III, 431, 442.

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are expressions of extralegal observation of the operation of the legal order, as in our popular saying, "possession is nine points of the law." Sometimes they represent attempts to state the settled custom in a few easily remembered words.[77] The juristic maxims of the transition from the strict law may contain echoes of these archaic legal proverbs, but they are quite a different thing, arising to meet different needs, and for the most part but imitate the sententious proverbial style.

In Germanic law we may see the two types and may mark the influence of the one upon the other as the customary law comes under the influence of the canon law and of the civil law. In the oldest form in which we know it, Germanic law is in the proverbial form which is characteristic of primitive law. Later it was largely put in legislative form or reduced to writing in law books. Still later it was worked over by jurists, and although, except in England, it was ultimately pushed into the background by the reception of Roman law, it persisted and has contributed important elements to the modern codes.

Maxims were very numerous in French customary law. For a long time they were preserved only in oral tradition. At the end of the sixteenth century and the beginning of the seventeenth century they began to be collected and published.[78] The important book is Loisel,[79] in which the essential rules of the *droit coutumier* are put in the form of proverbs. Maxims of very different periods

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[77] *E. g.*, "*Man ende wijf hebben geen verscheyden goet*," MATTHAEUS, PAROEMIAE BELGARUM JURISCONSULTIS USITATISSIMAE, 15. That is, "husband and wife have no separate goods," a proverbial statement of the matrimonial property régime known as community property. Compare, "*Aet tham neglum gehwylcum scilling*," that is, "for every nail a shilling." ETHELBERT'S DOOMS, 55; LIEBERMANN, GESETZE DER ANGELSACHSEN, I, 6. Ancient "codes," *i. e.*, reductions to writing of primitive customary law, are full of this. *E. g.*, in the XII Tables: "*Cum nexum faciet mancipiumque uti lingua nuncupassit, ita ius esto*," — "When he makes nexum or mancipium, as he speaks orally so be the law." Compare the fragments of traditional customary law called the *leges regiae*, *e. g.*, the fragment attributed to Servius Tullus: "*Si parentem puer uerberit ast olle plorassit puer diuis parentum sacer esto*," — "If a boy beat his parent or abuse him, be the boy devoted to the gods of the parents."

[78] ESMEIN, COURS D'HISTOIRE DU DROIT FRANÇAIS, 13 ed., 814. For collections of these maxims, in addition to Loisel, see L'HOMMEAU, MAXIMES GÉNÉRALES DU DROIT FRANÇAIS (1614); POCQUET DE LIVONNIÈRE, RÈGLES DU DROIT FRANÇAIS (1730); FERRIÈRE, NOUVEAU INSTITUTION COUTUMIÈRE (1730); PRÉVÔT DE LA JANES, PRINCIPES DE JURISPRUDENCE (1770).

[79] LOISEL, INSTITUTES COUTUMIÈRES (1608), ed. by Dupin and Laboulaye (1846).

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of legal development are contained in these collections, and they are put side by side without any historical critique. Some of them belong to a very old stock of Germanic legal proverbs. Others are relatively modern and some are obvious phrasings of the law of the time in proverbial form. It is clear that several influences had been at work. One was the Roman and the canon law, with their collections of maxims. The customary law was still close to the primitive form and was full of traditional legal sayings which were applied according to the "equity" of the tribunal. But it had passed into a strict law, and jurists had begun to study it, to write upon it,[80] and even to teach it.[81] The exigencies of commenting on a theoretically fixed custom which might be interpreted and expounded but not consciously altered led to a jurisprudence of maxims, as we have seen like circumstances do in so many other systems. There was a considerable development of this jurisprudence of maxims down to the Revolution [82] and more than one of the maxims in use in modern French law are of customary and so ultimately of Germanic origin.[83]

In Germany the maxims of the Germanic law were often called *paroemiae*.[84] They had a similar development to that of the maxims of French customary law and for like reasons.[85] Recently in the enthusiasm of revived study of Germanic law and of the Germanic element in modern law attempts have been made to utilize them

[80] VIOLLET, PRÉCIS DE L'HISTOIRE DU DROIT FRANÇAIS, 3 ed., 227–229.

[81] VIOLLET, PRÉCIS DE L'HISTOIRE DU DROIT FRANÇAIS, 3 ed., 236.

[82] See the books cited in note 78, *supra*.

[83] *E. g.*, "*Donner et retenir ne vaut.*" This is a maxim of the Germanic law growing out of the idea of seisin of movables. COLIN ET CAPITANT, DROIT CIVIL FRANÇAIS, II, 774–776; Desjardins, "Recherche sur l'origine de la règle 'donner et retenir ne vaut,'" 33 REVUE CRITIQUE DE LÉGISLATION, 207, 311; HUEBNER, HISTORY OF GERMANIC PRIVATE LAW, trans. by Philbrick, 426, note 2. "*Possession vaut titre*" is a juristic maxim developed out of the same idea of the Germanic law. It seems to have acquired its final form late in the eighteenth century, as attempt to put it in Roman terms would also indicate. JOBBÉ-DUVAL, ÉTUDE HISTORIQUE SUR LA REVENDICATION DES MEUBLES EN DROIT FRANÇAIS, 230. It will be noted that these maxims of the customary law are not in Latin.

[84] HERTIUS, PAROEMIAE (1693); MATTHAEUS, PAROEMIAE BELGARUM JURISCONSULTIS USITATISSIMAE (1667); PISTORIUS, THESAURUS PAROEMIARUM (1715); VOLKMAR, PAROEMIAE (1854).

[85] EISENHART, GRUNDRISS DES DEUTSCHEN RECHTS IN SPRÜCHWÖRTERN (1759, 3 ed., 1823); HILLEBRAND, DEUTSCHE RECHTSSPRICHWÖRTER (1858); GRAF UND DIETHERR, DEUTSCHE RECHTSSPRICHWÖRTER GESAMMELT UND ERKLÄRT (1864); OSENBRÜGGEN, DIE DEUTSCHE RECHTSSPRICHWÖRTER (1876).

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for juristic purposes; but no real advantage has resulted.[86] Here, as in the French law, there is an older element representing the so-called spontaneous formation of popular proverbial sayings, and a later element due to conscious formulation of maxims often after the example of Roman law, but not at all on Roman-law lines, in circumstances not unlike those in which the Roman maxim originally saw light. The compilations often confuse these and put them side by side, as did the French compilations, and in this respect there is striking analogy to the treatment of *brocardica* by the commentators. The later maxims had behind them neither the juristic skill nor the successive editings and reframings that were behind the Roman maxims; nor was the Roman model before those who framed them so directly and consciously as it was before those who framed the *brocardica* of the canon law and of the civil law of the Middle Ages. For juristic purposes the Roman model is infinitely to be preferred to the model of the popular proverb. The older maxims of the Germanic law are marked by the vague and unprecise characteristics of an oral tradition.[87] Although they have the unforgettable quality that attaches itself to a popular proverbial saying, they are of no more than historical interest in modern law. More may be said for the later type where the jurist has been at work and conscious reflection upon the rules of a body of primitive law which has passed into the stage of the strict law, has yielded a stock of maxims in which we may see a first tentative toward principles.

6. Maxims in the Common Law

Legal proverbs of the kind of which Germanic law was full may be found in Anglo-Saxon law.[88] But the primacy of royal justice

[86] Beseler, System des gemeinen deutschen Privatrechts, I, 336; Cosack, Lehrbuch des deutschen bürgerlichen Rechts, II, § 193c, 6 ed., 96. Heilfron, Lehrbuch des bürgerlichen Rechts, I, 491. *Cf.* Brissaud, Manuel d'histoire du droit français, 1392.

[87] Brissaud, Manuel d'histoire du droit français, 22. "The legal proverbs have a lesser value in that they are often ambiguous and obscure." Stobbe, Handbuch des deutschen Privatrechts, 3 ed., I, 181.

[88] "Whence in English a proverb is had: *Begge spere of side othe bere*, which is to say, 'Buy spear from side or bear it.'" Leges Edwardi Confessoris, 12, 6; Liebermann, Gesetze der Angelsachsen, I, 638–639.

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after the conquest and the development of the common law through the king's courts put an end to the evolution of popular legal proverbs and led to the rise of the professional legal maxim. At first there is a mere quotation of an occasional maxim of the Roman law. Thus Thomas of Marlborough, who may have been Bracton's teacher, quotes a bit of verse containing *quicquid plantatur solo, solo cedit*, which is found also in the margin of some MSS. of Bracton.[89] Bracton adds an occasional maxim of the Germanic or feudal law.[90] The earlier Year Books show a small stock of maxims, chiefly in Latin and from the Sext[91] (which is referred to as the "written law"),[92] sometimes from the civil law,[93] sometimes apparently from the writings of canonists or civilians,[94] but sometimes proverbial sayings of the customary law.[95] Maxims of the common

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[89] Maitland, Bracton and Azo, pp. xxii, 121.

[90] *E. g.*, *putagium non adimit hereditatem*, fol. 88.

[91] The most frequent are: *Uolenti non fit injuria* (No. 27 in the title of the Sext *De regulis iuris*), Hotot *v.* Rychemund, Mich. 4 EDW. II, 88 (1311), 22 SELD. SOC., 199, 200; Attemulle *v.* Saundersville, Trin. 6 EDW. II, 2 (1313), 36 SELD. SOC. 4, 9; Anon., Mich. 16 EDW. III, 85 (1342), Pike, II, 565; Anon., Trin. 19 EDW. III, 55 (1345), Pike, 253. *Melior est conditio possidentis* (No. 45 in the Sext — *cf.* DIG. L, 17, 154), Anon., Mich. 30 EDW. I (1302), Horwood, 56; Lilleburne *v.* Draper, Hil. 4 EDW. II, 36 (1310–11), 26 SELD. SOC. 68; Audley *v.* Deyncourt, Trin. 6 EDW. II, 20 (1313), 36 SELD. SOC. 68, 70. Others are: *Nemo obligatur ad impossibile* (No. 6 in the Sext), Hotot *v.* Rychemund, Mich. 4 Edw. II, 38 (1311), 22 SELD. SOC. 199, 200; *Ratihabitio retrotrahitur et mandato comparatur* (No. 10 in the Sext), Cornish Iter. 30 EDW. I (1302), Horwood, 129.

[92] *E. g.*, by Bereford, C. J., in Hotot *v.* Rychemund, Mich. 4 EDW. II, 88 (1311), 22 SELD. SOC. 199, 200.

[93] The most frequent is: *Res inter alios acta* (COD. VII, 56, 2 and 4), cited in Anon., Hereford Iter., 20 EDW. I (1292), Horwood, 25; Anon., Com. Pleas, 21 EDW. I (1293), Horwood, 295; Anon., 2 EDW. II, 19 (1308–9), 17 SELD. SOC. 71; Bayeux *v.* Beryhale, Mich. 3 EDW. II, 15 (1309), 19 SELD. SOC. 110.

[94] *Ubi est eadem racio ibi est idem ius*, Knyveton *v.* Abbot of Newboth, Trin. 1 EDW. II, 2 (1308), 17 SELD. SOC. 31; *lites ex litibus oriri non debent*, Le Marchaud *v.* Collon, Cornish Iter., 30 EDW. I (1302), Horwood, 158–160; *melius est nocentem relinquere impunitum quam innocentem punire*, Anon., 30–31 EDW. I, Horwood, App. II, 538; *mortuo mandatore exspirat eius mandatum*, Anon., Trin. 14 EDW. III (1388), Horwood, 627; *ex nudo pacto non oritur actio*, Anon., Pasch. 15 EDW. III, 50 (1341), Horwood, 137; *uigilantibus et non dormientibus, etc.*, Anon., Trin. 15 EDW. III, 29 (1341), Pike, 239; *fraus et dolus nemini debent patrocinari*, Anon., Mich. 15 EDW. III, 9 (1341), Pike, 309; *in negatis non est usus*, Anon., Hil. 16 EDW. III, 38 (1342), Pike, 119.

[95] "A man shall not be received to his law touching a matter whereof the county may have knowledge." Of this, Bereford, J., said: "*Vostre maxime est trop large.*" Anon., 2 EDW. II, 106*b* (1308–9), 19 SELD. SOC. 17. *Putage ne tout pas heritage*, Halstede *v.* Gravashale, 2 EDW. II, 129 (1308–9), 19 SELD. SOC. 53, 55.

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law on the Roman model,[96] or attempts to frame such maxims,[97] may be seen also. There is perhaps one borrowing from logic.[98] The term "maxim" occurs twice; once in connection with a proposition of the common law phrased in the vernacular.[99] *Regula*, the term used in the Sext, is more usual.[100] Gross misuse of maxims taken from the Sext is not uncommon.[101]

Scholastic adoption of Aristotelianism and the consequent emphasis upon formal logic made itself felt in English law in the fifteenth century. Fortescue [102] begins his juristic theory with Aristotle's causes. He proceeds to say: "As for principles (*principia*), which the Commentator [103] calls the efficient causes, these are no other than certain *uniuersalia*, which the learned in the law as well as the mathematicians call maxims (*maximas*); in rhetoric they are called *paradoxa*, the civilians call them *regulae iuris*." [104] Littleton [105] uses "principle" and "maxim" indifferently in this very sense,[106] often using both in a way quite different from that with which we are now familiar. Thus he says it is a maxim that "inheritances may lineally descend but not ascend,"[107] but it is also a maxim that "he which hath an estate but for term of life shall neither do homage nor take homage." [108] It is a "principle"

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[96] *Quia quod nondum erat in persona concedentis nullum erit in persona concessi*, Elys *v.* Ryggesby, Hil. 3 EDW. II, 9*b* (1310), 19 SELD. SOC. 176. *Malitia supplet aetatem*, Anon., Trin. 12 EDW. III (1338), Horwood, 627.

[97] "*Et ideo discat unusquisque terminarius quod habeat terminum suum sub tali tempore quod habere posset croppum suum sine calumpnia.*" Note, Hil. 4 EDW. II (1310–11), 26 SELD. SOC. 133.

[98] *Cessante causa cessare debet effectus.* Le Marchaud *v.* Collon, Cornish Iter., 30 EDW. I (1302), Horwood, 158–160.

[99] Bayeux *v.* Beryhale, Mich. 3 EDW. II, 15 (1309), 19 SELD. SOC. 110 (*res inter alios acta*); Anon., 2 EDW. II, 106*b* (1308–9), 19 SELD. SOC. 17 (rule as to wager of law). In Lilleburne *v.* Draper, Hil. 4 EDW. II, 36, 26 SELD. SOC. 68, the translation uses the term "maxim" but not the original.

[100] Heyling *v.* Rabeyn, Hil. 3 EDW. II, 20*c*, 20 SELD. SOC. 24, 25 (*melior est condicio possidentis*); Anon., Com. Pl., 21 EDW. I (1293), Horwood, 295 (*res inter alios acta*).

[101] *E. g.*, in connection with a bond to do the impossible, Bereford, C. J., vouches *uolenti non fit iniuria* — he willed to execute the instrument, there is no wrong in holding him to it. Hotot *v.* Rychemund, Mich. 4 EDW. II, 88, 22 SELD. SOC. 199, 200.

[102] DE LAUDIBUS LEGUM ANGLIAE, cap. 8 (written before 1471).

[103] Apparently Duns Scotus.

[104] DE LAUDIBUS LEGUM ANGLIAE, cap. 8. [105] Written between 1475 and 1481.

[106] "That which our author here calleth a principle, Sect. 3 & 90, he calleth a maxime." CO. LIT. 343*a*.

[107] LITTLETON, § 3. [108] LITTLETON, § 90.

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that "of every land there is a fee simple in somebody" and that "every land of fee simple may be charged with a rent charge in fee by one way or other." [109] In this sense the rule in Shelley's Case would be a "principle" or a "maxim." The term is used to mean an established rule of the strict law. This is brought out even more clearly in Doctor and Student.[110] We are told that there are six "grounds of the law of England": (1) The law of reason, (2) the law of God, (3) "divers general customs of oldtime used through all the realm," (4) "divers *principles*, that be called in the law *maxims*, the which have always been taken for law in this realm, so that it is not lawful for any that is learned in the law to deny them; for every one of those maxims is sufficient for himself," (5) "divers particular customs used in divers counties, towns, cities and lordships in this realm," (6) divers statutes made in parliament.[111] But these "principles" or "maxims" are by no means general premises for judicial reasoning. They are definite detailed legal rules of narrow content and are said to be "of the same strength and effect in the law as statutes be." [112] Occasionally there is some attempt at terse statement.[113] Sometimes there is a comparison and distinction of apparently conflicting rules.[114] In another chapter [115] ten cases are discussed in which it is doubtful

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[109] LITTLETON, § 648.

[110] Dialogue I, chap. 8 (1523).

[111] *Ibid.*

[112] *Cf.* the earlier Roman *regulae*, JÖRS, GESCHICHTE DER RÖMISCHEN RECHTSWISSENSCHAFT ZUR ZEIT DER REPUBLIK, 293.

The following examples will show the nature of the twenty-four "máxims" set forth in chapter 8:

1. "Escuage uncertain maketh knight's service."

2. "Escuage certain makes socage."

10. "A right or title of action that only dependeth in action cannot be given or granted to none other but only to the tenant of the ground, or to him that hath the reversion or remainder of the same land."

20. "He that recovereth debt or damages in the king's courts, by such an action wherein a *capias* lay in the process may within a year after the recovery have a *capias ad satisficiendum*, to take the body of the defendant and to commit him to prison till he have paid the debt and damages; but if there lay no *capias* in the first action, then the plaintiff shall have no *capias ad satisficiendum*, but must take a *fieri facias*, or an *elegit* within the year, or a *fieri facias* after the year, or within the year if he will."

[113] *E. g.*, No. 4, "A descent taketh away an entry;" No. 5, "No prescription in lands maketh a right."

[114] *E. g.*, No. 9, "A condition to avoid a freehold cannot be pleaded without deed; but to avoid a gift of chattel, it may be pleaded without deed."

[115] Dial. I, chap. 9.

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"whether there be only maxims of the law or that they be grounded upon the law of reason." These are rules such as "the accessory shall not be put to answer before the principal" or "if land descend to him that hath right to the same land before, he shall be remitted to his better title, if he will." [116] Rarely do we find what we should understand to be maxims today.[117] The argument of Serjeant Morgan in *Colthirst* v. *Bejushin*, reported by Plowden,[118] shows the same idea. "There are," he argues, "two principal things from which arguments may be drawn, that is to say, our maxims, and reason which is the mother of all laws. But maxims are the foundations of the law, and the conclusions of reason, and therefore they ought not to be impugned but always to be admitted: yet these maxims may by the help of reason be compared together and set one against another (although they do not vary) whereby may be distinguished by reason that a thing is nearer to one maxim than to another, or placed between two maxims; nevertheless they ought never to be impeached or impugned, but always be observed and held as firm principles and authorities of themselves." At first sight this seems to refer to general formulations of broad principles which are to be the basis of argument and of judicial reasoning. But note the "maxims" which he proceeds to cite and to compare. They are: (1) "There is a maxim that when a remainder is appointed to one, he to whom it is appointed ought at that time to be a person able to have capacity to take the remainder, as else it shall be void," and (2) "that the remainder ought to pass out of the lessor at the time of the livery." [119] Clearly we have here a phenomenon of the strict law with which the course of the present study has made us familiar. Reflection upon judicial decisions, regarded as authoritative statements of law, has led to the formulation of rules. These rules are not to be questioned; they may only be interpreted and applied. They have the same

[116] See a like sort of "maxim" in Dial. II, chap. 4, Dial. II, chap. 46.

[117] "For that law seemeth not reasonable that bindeth a man to an impossibility," Dial. II, chap. 5; "There is an old maxim in the law that a mischief shall be rather suffered than an inconvenience," *Ibid.*; "No time . . . runneth to the king," Dial. II, chap. 36.

[118] 1 PLOWD. 21, 27 (1551).

[119] *Id.*, 27*a*. See also SWINBURNE, BRIEFE TREATISE OF TESTAMENTS AND LAST WILLS (1590), 59: "For it is a maxime in the common lawes of this realme that he that is outlawed doeth forfeite all his goods and cattelles to the Prince."

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effect as statutes. But they may be compared, apparent conflicts may be reconciled, and they may be justified by reason. The next step is to generalize still further to legal principles, and that step was soon to come.

In the writings of Coke the influence of writers upon logic is very marked. As has been seen, his definition of a maxim [120] goes back to Albertus Magnus, and in defining a "principle" as a synonym of a maxim, he quotes Aristotle.[121] Some of his maxims are detailed legal rules,[122] as in Doctor and Student, some are legal proverbs,[123] and some are logical propositions or formulations of general principles.[124] Standing at the end of a period of strict law which culminates and is put in its authoritative form in his writings, he uses maxims as did the jurists of the last days of republican Rome when the transition to the stage of natural law was well under way. And Coke's theory is beginning to be that of the period of natural law, if his law and his method are of the period of the strict law. When reason was held to be the life of the law and it was held that the "common lawe itselfe is nothing else but reason," [125] the reason was sure presently to supersede the rule as the decisive factor in judicial decision.

A new chapter in the history of maxims in the common law begins with Bacon. Written before Coke's Commentary on Littleton, Bacon's Maxims [126] definitely abandons the method and ideas of the strict law and uses "maxim" to mean a tersely formulated general principle. Moreover the greater number of his twenty-five maxims represent independent attempts to state principles derived by study of rules in the most diverse parts of the law. Although they are put in Latin, they are by no means mere borrowings from the Digest or the Sext. One, indeed, is taken directly from the Digest.[127] For the rest, his statement in the preface proves to be accurate: "Some of these rules have a concurrence

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[120] Co. Lit. 10*b*–11*a*.

[121] Co. Lit. 343*a*.

[122] Co. Lit. 10*b*, 343*a*.

[123] Co. Lit. 49*b*, 2 Inst. 63.

[124] Co. Lit. 70*b*, 355*b*, 356*a*.

[125] Co. Lit. 97*b*.

[126] Written 1596, published 1630. Coke on Littleton, as the preface shows, was written after 1625 and was published in 1628. As to Bacon's preference for aphorisms over continuous argumentative discourse, see Church, Bacon, 283–284.

[127] No. 11, *Iura sanguinis nullo iure ciuili dirimi possunt.* (Dig. L, 17, 8). This maxim is not in the Sext. Bacon says of it: "They be the very words of the civil law which can not be amended [*i. e.* bettered]."

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with the Roman civil law, and some others a diversity, and many others an opposition." After the manner of the time, he put them in Latin, although he had worked them out and framed them himself; "which language," he adds, "I chose as the briefest to contrive the rules compendiously, the aptest for memory, and of the greatest authority and majesty to be vouched in argument." [128] In the very spirit of the rising philosophy of law which was to make the seventeenth century a period of growth he avoids a hard and fast system so as to "leave the wit of man more free to turn and toss and to make use of that which is delivered to more several purposes and applications." [129] He uses "rule" and *regula* as synonymous with "maxim." But this does not mean that he uses "maxim" in the sense of a rule of the strict law. Rather he thinks of principles as the materials of the legal system and as having the authority which the immediate past had ascribed to rules. In the discussions under each maxim he quotes maxims of logic [130] and maxims of the civilians.[131] He nowhere uses the Sext. To the extent that his maxims have passed into common use, Maitland's proposition [132] that when English lawyers even in the nineteenth century use Latin maxims they are quoting from the Sext, is not well taken. As a first tentative toward systematic generalization Bacon's Maxims deserves an honorable place in the history of the common law. We need but compare one of Bacon's maxims with one of the maxims in Doctor and Student to see that a long step forward has been taken in legal science. To a body of absolute and unquestioned detailed rules, to be compared with one another, to be interpreted and to be applied directly or by analogy, we have added broad general premises for legal reasoning, reached by analysis and comparison of the rules, and by which the rules themselves must presently be tried.[133]

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[128] BACON, MAXIMS, preface.

[129] *Ibid.*

[130] *E. g.*, under No. 24: *Ex multitudine signorum colligitur identitas.*

[131] *E. g.*, under No. 3: *Diuinatio non interpretatio est quae omnino recedit a litera.* DIG. II, 7, 5, 3. This is not in the Sext. See also the discussions under Nos. 5, 12, 20, where he draws upon the commentators.

[132] 1 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, 196.

[133] See for example the way in which Blackstone tried a particular rule of descent by a logical principle reached through study of the rules of descent as a whole. 2 BLACKSTONE, COMMENTARIES, 238–239.

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Finch's Law [134] is a book of much the same type. It is an attempt to put law upon a philosophical basis, to state its principles universally and arrange them systematically, and to subsume the actual rules of law under those principles. Thus arbitrary rules of the strict law are sought to be put in terms of logic.[135] In Book I there are about one hundred maxims, all in the vernacular. Only one is actually taken from the Sext,[136] but four others are much like maxims in the Sext.[137] Probably these were traditionally in use in the courts. For the rest there is an evident attempt to frame original statements rather than to collect current professional proverbs. Noy [138] is a book of much less value. The classification is borrowed from Finch. Of the thirty-five maxims, one is in the words of the Sext [139] and three others are obviously variants of the Sext,[140] two are from the Digest,[141] and many are but Finch's principles put into Latin. Wingate [142] belongs definitely to the type of compiler. He gives two hundred and fourteen maxims, arranged according to Finch. Four are taken from or variants of the Sext.[143] Some are taken from Noy.[144] There is little in the way of independent search for principles. Wood,[145] the forerunner of Blackstone, is both systematizer and compiler. In his introduction he sets forth a series of "rules" concerning law, customs, and statutes respectively, which are partly legal proverbs,[146] partly maxims handed down from the Digest and the Sext, and partly

[134] LAW OR A DISCOURSE THEREOF, 1627.

[135] Thus the rule requiring a formal release of a sealed instrument is put as a principle of logic that "things are dissolved as they be contracted." FINCH, LAW, bk. I, chap. 1.

[136] No. 92 is No. 72 of the Sext.

[137] No. 16 should be compared with No. 35 in the Sext, No. 22 with No. 35 in the Sext, No. 25 with No. 42 in the Sext, and No. 36 with No. 45 in the Sext.

[138] NOY, TREATISE OF THE PRINCIPALL GROUNDS AND MAXIMS OF THE LAWES OF THIS KINGDOME, 1641.

[139] No. 9 is No. 18 in the Sext and goes back to DIGEST, L, 17, 29.

[140] Nos. 14, 35, and 47.

[141] Nos. 24 and 27.

[142] WINGATE, MAXIMS OF REASON OR THE REASON OF THE COMMON LAW OF ENGLAND, 1658.

[143] No. 24 is a variant of No. 79 in the Sext (DIG. L, 17, 54); No. 49 is No. 54 in the Sext; No. 122 is a variant of No. 27 in the Sext, and No. 124 is No. 10 in the Sext.

[144] No. 7 is Noy's No. 10.

[145] WOOD, INSTITUTE OF THE LAWS OF ENGLAND, 1722.

[146] *E. g.*, "Common law is common right;" "The law respects the order of nature."

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seventeenth-century attempts to state legal principles. Francis [147] must be spoken of fully in another connection. Branche [148] is simply a compiler, presenting a motley collection of Romanist materials from the Digest, the Sext, and the civilian commentators, of legal proverbs and professional sayings of common-law origin, of seventeenth-century attempts to formulate legal principles in their infancy during the transition from the strict law, and of borrowings from scholastic logic. Blackstone, full of old common-law learning, often reverts to the usage of Littleton and of Coke and speaks of "established rules and maxims of the common law," meaning detailed legal rules.[149] Elsewhere he speaks of "general rules and maxims" for the construction of instruments, giving seven rules of interpretation fortified by quotation of Latin maxims.[150] These should be compared with his ten rules for the interpretation of statutes, which are called "rules." [151] The parallel with what went on contemporaneously upon the Continent is significant. Beginning with attempts to formulate the customary law in general principles framed after the Roman manner, we end in mere compilations in which, as in the treatment of *regulae* in the Digest and of *brocardica* by the commentators, materials of the most diverse date and historical origin are uncritically heaped together.

Nowadays we know maxims chiefly through Broom.[152] Bacon's maxims represent an attempt to use philosophy creatively. On the other hand the nineteenth century had for a season to assimilate and organize the rich materials which had come into the common law in a period of growth. System was needed, rather than creation. Accordingly Broom's book is an attempt to make maxims the basis of a legal philosophy drawn from within the law whereby to organize and assimilate the infusions from without through the rise of equity and the absorption of the law merchant and the liberalizing tendencies of the seventeenth and eighteenth centu-

[147] FRANCIS, MAXIMS OF EQUITY, 1728.

[148] BRANCHE, PRINCIPIA LEGIS ET AEQUITATIS, being an alphabetical collection of maxims, principles, or rules, definitions and memorable sayings in Law and Equity, 1753.

[149] 1 BLACKSTONE, COMMENTARIES, 68.

[150] 2 COMMENTARIES, 378.

[151] 1 COMMENTARIES, 87 ff.

[152] BROOM, A SELECTION OF LEGAL MAXIMS, CLASSIFIED AND ILLUSTRATED, 1845, 8 ed., 1911. Contains one hundred and three maxims, all in Latin.

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ries. The historical idea was abroad also. Hence the historical materials of the maxims, supposed to have been handed down from a remote past, were to be the basis of the organizing and systematizing philosophy. Moreover just at that time the formal defects of the common law and its lack of systematic arrangement were felt acutely. The legislative reform movement was in full tide. Exaggerated respect for Roman legal science was in the air, and Latin maxims seemed to bear a hallmark of science. But the attempt to revive a jurisprudence of maxims came to nothing.[153] Analysis and a surer and more critical historical method did later in the century, when we were less sure of the exclusive title of the Romans to legal reason and juristic science, what men thought to do earlier in the century by a jurisprudence of maxims transferred from the first century to the nineteenth. A jurisprudence of conceptions soon evolved and was the main engine of nineteenth-century justice.

We are now prepared to take up the maxims of equity.

Roscoe Pound.

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[*To be continued*]

[153] Its most conspicuous achievement was the attempt to make Bacon's logical proposition with respect to proximate and remote causes a touchstone of legal liability. The result was to confuse the subject for at least a generation. See Smith, "Legal Cause in Actions of Tort," 25 HARV. L. REV. 103, 223, 303; Beale, "The Proximate Consequences of an Act," 33 HARV. L. REV. 633. As to the history of two typical maxims, see Goudy, "Two Ancient Brocards," in VINOGRADOFF, ESSAYS IN LEGAL HISTORY, 215–232.

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